Supreme Court, U. S.
FILED
JUL 23 1975
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1187

JOSEPH BAXTER, et al.,
PETITIONERS,

v.

NICHOLAS A. PALMIGIANO,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

JULIUS C. MICHAELSON
Attorney General
RONALD A. DWIGHT
Special Assistant
Attorney General
250 Benefit Street
Providence, Rhode Island 02903
(401) 831-6850

July 24, 1975

Blanchard Press, Inc., Boston, Mass. — Law Printers

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Constitutional Provisions and Rhode Island Regulations Involved	2
Questions Presented	3
Statement of Facts	3
Travel of the Case	6
Summary of Argument	9
Argument	
I. The Court of Appeals Erred in Stating That *Wolff* v. *McDonnell* Does Not Apply to the Prisoner Before a Disciplinary Board Who Has Committed an Infraction Which May Also Be Punishable as a Crime.	10
II. Neither the Sixth nor the Fourteenth Amendments of the Constitution Require the Presence of Counsel at Prison Disciplinary Hearings Where the Infraction May Also Be Punishable as a Crime.	14
III. The Facts and Policy of *Miranda* v. *Arizona* Have No Application to a Prison Disciplinary Hearing Under the *Morris Rules*.	21
IV. A Disciplinary Board May Properly Draw an Inference of Guilt From a Prisoner's Silence at a Disciplinary Hearing, and if Such an Inference Is Made, Need Not Grant Use Immunity for any Statements the Prisoner May Make.	28
Conclusion	35

Table of Citations

Cases

Anti-Fascist Committee v. *McGrath*, 341 U.S. 123 (1951)	16
Argensinger v. *Hamlin*, 407 U.S. 25 (1972)	14

	Page
Braxton v. *Carlson*, 483 F.2d 933 (3d Cir. 1973)	13
Brady v. *United States*, 397 U.S. 742 (1970)	32
Bruno v. *United States*, 308 U.S. 287 (1939)	29
Cafeteria Workers v. *McElroy*, 367 U.S. 886 (1961)	16
Clutchette v. *Procunier*, 497 F.2d 809 (9th Cir. 1974), *modified and aff'd on rehearing*, 510 F.2d 613 (9th Cir. 1975), *cert. granted sub nom. Enomoto* v. *Clutchette*, 33 U.S.L.W. 3641 (June 9, 1975) (No. 74-1194)	9, 12, 13
Coleman v. *Alabama*, 399 U.S. 1 (1970)	14
Duncan v. *Louisiana*, 391 U.S. 145 (1968)	15
Flint v. *Mullen*, 499 F.2d 100 (1st Cir. 1974)	27, 32
Fowle v. *United States*, 410 F.2d 48 (9th Cir. 1969)	30
Gagnon v. *Scarpelli*, 411 U.S. 778 (1973)	17, 20, 27, 28
Garrity v. *New Jersey*, 385 U.S. 493 (1967)	29, 30
In re Gault, 387 U.S. 1 (1967)	15
Gideon v. *Wainwright*, 372 U.S. 335 (1963)	14, 15
Griffin v. *California*, 380 U.S. 609 (1965)	28
Goldberg v. *Kelly*, 397 U.S. 254 (1970)	16
Hamilton v. *Alabama*, 368 U.S. 52 (1961)	15
Hannah v. *Larche*, 363 U.S. 420 (1960)	16
Hyser v. *Reed*, 318 F.2d 225 (D.C. Cir.), *cert. denied sub nom. Jamison* v. *Chappell*, 375 U.S. 957 (1963)	14
Kirby v. *Illinois*, 406 U.S. 682 (1972)	23
Klopfer v. *No. Carolina*, 386 U.S. 213 (1967)	15
Lefkowitz v. *Turley*, 414 U.S. 70 (1973)	29
McGautha v. *California*, 402 U.S. 183 (1971)	32, 33, 34
Malloy v. *Hogan*, 378 U.S. 1 (1964)	15, 29
Massiah v. *United States*, 377 U.S. 201 (1964)	14
Mathis v. *United States*, 391 U.S. 1 (1968)	25
Meyers v. *Aldridge*, 492 F.2d 296 (3d Cir. 1974)	13
Miranda v. *Arizona*, 384 U.S. 436 (1966)	passim
Morris v. *Travisono*, 310 F. Supp. 857 (D.R.I. 1970)	4
Morrissey v. *Brewer*, 408 U.S. 471 (1972)	15, 20

	Page
Nolan v. *Scafati*, 306 F. Supp. (D. Mass. 1968), *vacated and remanded*, 430 F.2d 548 (1st Cir. 1970)	20
In re Oliver, 333 U.S. 257 (1948)	15
Orozco v. *Texas*, 394 U.S. 324 (1969)	25
Osborne v. *United States*, 371 F.2d 913 (9th Cir.), *cert. denied*, 387 U.S. 946, *rehearing denied*, 389 U.S. 891 (1971)	30
Palmigiano v. *Baxter*, 487 F.2d 1280 (1st Cir. 1973) (*Baxter I*), *vacated and remanded*, 418 U.S. 908 (1974), *aff'd in part and rev'd in part*, 510 F.2d 534 (1st Cir. 1974) (*Baxter II*), *cert. granted*, 33 U.S. L.W. 3641 (June 9, 1975)	passim
Pointer v. *Texas*, 380 U.S. 400 (1965)	15
Powell v. *Alabama*, 287 U.S. 45 (1932)	15, 26
Roberts v. *Taylor*, 390 F. Supp. 705 (D.R.I. 1975)	9 18
Simmons v. *United States*, 390 U.S. 377 (1968)	32, 33
Sostre v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971), (*en banc*), *cert. denied sub nom. Oswald* v. *Sostre*, 405 U.S. 978 (1972)	13, 27
Spevack v. *Klein*, 385 U.S. 511 (1967)	29, 30
United States v. *Adams*, 470 F.2d 249 (10th Cir. 1972)	30
United States v. *Ash*, 413 U.S. 300 (1973)	14
United States v. *English*, 409 F.2d 200 (3d Cir. 1969)	29
Washington v. *Texas*, 388 U.S. 14 (1967)	15
White v. *Maryland*, 373 U.S. 59 (1963)	14
Wolff v. *McDonnell*, 342 F. Supp. 616 (D. Neb. 1972)	10
Wolff v. *McDonnell*, 418 U.S. 539 (1974)	passim

Constitutional Provisions

United States Constitution,	
Amendment IV	33
Amendment V	passim
Amendment VI	2, 3, 14, 15
Amendment XIV	2, 3, 15, 16

Page

Statutes

18 U.S.C. §3481 29
28 U.S.C. §1254(1) 2
42 U.S.C. §1983 3
Nebraska Rev. Stat.,
§§28-411, -413, -441, -445, -735, -743 (1971) 9
§83-185 (1971) 11

Miscellaneous

Lovell and Nelson, *Correctional Management and the Changing Goals of Correction*, in Problems in Criminal Justice Administration (M. Cohn, ed., 1969) ... 32
Kadish, *The Advocate and the Expert — Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803 (1961) 17
Milleman, *Prison Disciplinary Hearings and Procedural Due Process—the Requirement of a Full Administrative Hearing*, 31 Md. L. Rev. 27 (1971) 4
Note, *Bargaining in Correctional Institutions: Restricting the Relations Between Inmate and Prison Authority*, 81 Yale L. J. 726 (1972) 32
Regulations Governing Disciplinary, Classification, and Mail Procedures for All Inmates at the Adult Correctional Institutions, State of Rhode Island (*Morris Rules*) ..... passim

In the Supreme Court of the United States

October Term, 1975

No. 74-1187

JOSEPH BAXTER, et al.,
PETITIONERS,

v.

NICHOLAS A. PALMIGIANO,
RESPONDENT.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals is reported at 510 F.2d 534 (1974) and is also reproduced in Appendix "A" to the Petition for Writ of Certiorari.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered December 20, 1974 and appears as Appendix "A" to the Petition for Writ of Certiorari. The Petition for Writ of Certiorari was filed on March 19, 1975 and was granted on June 9, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Constitutional Provisions and Rhode Island Regulations Involved

Article V of the Amendments to the United States Constitution provides in pertinent part as follows:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

Article VI of the Amendments to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article XIV, Section 1 of the Amendments to the United States Constitution provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The provisions of the "*Morris Rules*" pertaining to prison disciplinary hearing within the Adult Correctional Institutions of the State of Rhode Island and Providence Plantations are set out in the Appendix at pages 199-208 and are also reported at 310 F. Supp. 857, 865-75 (D.R.I. 1970).

Questions Presented

1. Whether the V, VI, and XIV Amendments to the Constitution of the United States, and the principles laid down in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), require that a prisoner confined under sentence for conviction of a crime be entitled to the presence of defense counsel at a prison disciplinary hearing where the infraction may also be the subject of criminal prosecution?
2. Whether the V and XIV Amendments to the Constitution of the United States require that "use immunity" be granted to a prisoner at a prison disciplinary hearing if an inference of guilt is drawn from his remaining silent.

Statement of Facts

The precise form of disciplinary hearings in the Rhode Island Adult Correctional Institutions (ACI) have been the subject of litigation since 1969 when a suit brought under 42 U.S.C. § 1983 demanded that Rhode Island afford its convicts a complex system of procedural due process

as a condition precedent to disciplinary punishment or rehabilitative classification. The final outcome of this litigation was a code of prison disciplinary rules, the *Morris Rules* adopted by agreement of both sides on March 10, 1970. *Morris* v. *Travisono*, 310 F. Supp. 857, 865-75 (D.R.I. 1970),[1] A. 203.

A brief perusal of the rules relating to disciplinary procedures will show that they provide an orderly and fair procedure for the efficient disposition of disciplinary cases. Inter alia, they provide that inmates charged by guards with serious rule infractions are entitled to a written charge by the reporting officer, an independent investigation by a superior officer, prior written notice, a hearing before an impartial disciplinary board, lay counsel, the right of confrontation and cross-examination ("except where the Board determines that an informant's identity must be protected" (A. 207)), and a decision "based upon substantial evidence." A. 208. Tape recordings of the hearings may be made by the inmate upon his own recorder. There is, in addition, a right of appeal to the Warden with provision for submission of objections. Where the infraction may also be the subject of criminal prosecution, the following provision applies to the initial investigation:

> I. Whenever an inmate is charged with an institutional violation which may be the subject of criminal prosecution, the written notice referred to in paragraphs E and F above shall so notify the inmate, and advise him that although statements he makes in his defense at a disciplinary hearing are probably not admissible for affirmative use by the prosecution at a trial, he may wish to consult an attorney to determine what action to take. [A. 206]

[1] The *Morris Rules* have received much favorable comment. See, e.g., Milleman, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing*, 31 Md. L. Rev. 27, 37-38 (1971).

This particular case arose from an incident which occurred on the night of November 11, 1972. The respondent, Nicholas A. Palmigiano, was then and is presently serving a life sentence for murder at the ACI. That day it appeared to Palmigiano that a fellow prisoner was seriously ill. A. 201. The guards on duty, in view of all the circumstances, reacted orderly by calling the Rhode Island Medical Center. A. 200. Because the maximum security unit of the ACI at that time held less than two hundred men, medical help had to be summoned from the nearby Rhode Island General Hospital. A delay ensued. Ten minutes before the regular nightly lock-up which interfered not even slightly with the ensuing medical assistance, Palmigiano went about advising other prisoners not to return to their cells for the 9:00 P.M. lock-up as a protest against the failure to provide immediate medical attention. At that point guards, pursuant to the *Morris Rules*, charged Palmigiano with "inciting a disturbance and disrupt [sic] of A.C.I. operations, which might have resulted in a riot." A. 197. Formal written notice followed, and Palmigiano was summoned before the disciplinary board. Palmigiano was informed that evening by Capt. Brule that criminal charges might be brought against him and that he should contact his attorney. A. 37.

Prior to entering the hearing room, Palmigiano was permitted to consult with his retained attorney and was then advised by Deputy Warden Remillard that while he had a right to remain "mute . . . it will be detrimental to your defense." A. 43. At the hearing itself, Palmigiano had the assistance of one Flint, authorized by the Warden and Assistant Director for Correctional Services to assist inmates at disciplinary hearings pursuant to *Morris Rule*

II (G).[2] A. 189. Written notice of the charges had been given to Flint as representative of the National Prison Reform Association in accordance with an understanding between the Warden and the inmates in effect at that time. A. 38, 185. Flint was then to and in fact did notify Palmigiano of the charges against him. A. 185. Palmigiano was informed at the hearing that the *Rules* did not permit the presence of either a retained or appointed attorney but that inmate substitute counsel would be permitted. A. 46, 186. Relying upon the written report of the reporting officer, the Board found Palmigiano guilty of the charged infraction and disciplined him to thirty days punitive segregation and recommended that his classification be degraded.[3] A. 46. Palmigiano exercised his right to appeal the determination of the disciplinary board to the Warden, but upon review the determination was upheld. A. 187.

Travel of the Case

Palmigiano thereafter filed suit under 42 U.S.C. § 1983 in the United States District Court for Rhode Island. His complaint (A. 6) alleged deprivation of procedural due process for failure of the *Morris Rules* to provide for appointed or retained counsel at the disciplinary hearing. After a full hearing on the merits, the District Court concluded that procedural due process had been accorded to Palmigiano at the disciplinary hearing. The Court found

[2] Inmates are presently assisted by classifications officers and not by other inmates in accordance with *Morris Rule* II (E). A. 206.

[3] *Palmigiano* v. *Baxter*, 487 F.2d 1280, 1282, footnotes 1-3 (1st Cir. 1973) (*Baxter I*) or A. 213, for a complete description of the various penalties available to the Board.

the following facts: Palmigiano was fully advised prior to the hearing of the infraction of the *Rules*; he had an opportunity to advice of counsel concerning the charge; he was aided by counsel-substitute during the hearing; the charge was read to him at the hearing; he was given the opportunity to explain his actions; he was informed of the evidence against him; he had an opportunity to call witnesses, which he did not exercise. Finally, the Court found the determination of the Board based upon substantial evidence. A. 189-90. It should be noted that no question of subsequent use immunity was raised in the District Court, because Palmigiano said nothing which could have been used against him in any subsequent criminal proceeding.

The judgment of the District Court was reversed on appeal, *Palmigiano* v. *Baxter*, 487 F.2d 1280 (1973) (*Baxter* I), A. 213 *et seq.*, the Court of Appeals for the First Circuit holding that "appellant was denied due process in the disciplinary hearing insofar as he was not provided with use immunity for statements he might have made within the disciplinary hearing, and because he was denied access to retained counsel during the hearing." 487 F.2d at 1292; A. 235. The Attorney General of Rhode Island thereafter filed a petition for writ of certiorari which was granted. 418 U.S. 908 (1974); A. 237. This Court vacated the judgment in *Baxter I, supra,* and remanded the case to the circuit court for reconsideration in light of this Court's opinion concerning due process requirements at prison disciplinary hearings in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974).

In its second *Baxter* decision, *Palmigiano* v. *Baxter*, 510 F.2d 534 (1974) (*Baxter* II) (Appendix "A" to the Petition for Writ of Certiorari), the First Circuit held that where "an inmate is called to a disciplinary hearing under the circumstances present here, and is informed

that his silence will be used against him, or indeed where his testimony is compelled, use immunity must be provided and the inmate must be so informed." 510 F.2d at 536; Appendix "A" at 11. More importantly, the Circuit Court reconsidered its holding that retained counsel be required at disciplinary hearings as follows:

> We now alter what we said concerning the remaining issue, the right to counsel, confined to a situation where future prosecution is contemplated. Again the *Wolff* ruling does not directly apply. This particular problem is more akin to that presented in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), where the Court was concerned with "circumstances surrounding in-custody interrogation [which] can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators." 384 U.S. at 469-70. *Mathis*, *supra*, applied *Miranda's* reasoning to those already in prison. It follows, therefore, that the *Miranda* solution must be foremost in the minds of prison administrators. They must make it quite clear to an inmate who is under threat of criminal prosecution that while he has a due process right to speak, he is under no compulsion to do so. If the inmate chooses to remain silent, he must not be questioned further. Moreover, in cases where criminal charges are a realistic possibility, prison authorities should consider whether defense counsel, if requested, should not be let into the disciplinary proceeding, not because *Wolff* requires it in that proceeding, but because *Miranda* requires it in light of future criminal prosecution. [510 F.2d at 537; Appendix "A" at 13-14.]

Because the State believes that the entire question of counsel at prison disciplinary hearings was decided by

this Court in *Wolff* v. *McDonnell*, *supra*, a second Petition for Writ of Certiorari was filed on March 19, 1975.[4] The Petition was granted on June 9, 1975, and the case set down for oral argument in tandem writ *Enomoto* v. *Clutchette*, No. 74-1194.

Summary of Argument

I. Every aspect of this Court's decision in *Wolff* v. *McDonnell*, *supra*, indicates that it was intended to apply to disciplinary hearings in general and not only to disciplinary hearings for infractions which are minor and not punishable as crimes. This is shown by the fact that several of the members comprising the class in *Wolff* had committed crimes and by the Court's specific citation of *Baxter I* in footnote 20, 418 U.S. at 573.

II. The right to counsel at a disciplinary hearing must be found in the due process clause of the Fourteenth Amendment and not in the Sixth Amendment. An application of the step-by-step weighing analysis of cases such as *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961), gives the same result reached in *Wolff*. Where an infraction is also a crime, the argument for swift discipline is even stronger.

III. The incommunicado interrogation which underlies *Miranda* v. *Arizona*, 384 U.S. 436 (1966) has no parallel in a *Morris Rules* disciplinary hearing. In *Miranda* this Court encouraged the States to continue their search for other ways to protect the right against self-incrimination. The *Morris Rules* are such a means and adequately fulfill the purposes of *Miranda* without the presence of counsel at a disciplinary hearing.

---

[4] The District Court in Rhode Island in *Roberts* v. *Taylor*, 390 F. Supp. 705 (1975), followed the dictates of *Baxter II* by requiring the grant of use immunity and the presence of counsel at the disciplinary hearings of two previously indicted inmates. The State has prepared a petition for writ of certiorari in *Roberts*, *supra*, requesting that it be considered with *Baxter* v. *Palmigiano*, No. 74-1187.

IV. There is no constitutional prohibition against a disciplinary board making the logical inference of guilt from the failure of an inmate to deny charges, as long as there is other substantial evidence upon which to base its decision. There is no necessity to grant use immunity for any statements made by an inmate at a disciplinary hearing for an infraction which is also a crime, since the choice which must be made is more akin to that made in *McGautha* v. *California*, 402 U.S. 183 (1971) than in *Simmons* v. *United States*, 390 U.S. 377 (1968).

Argument

I. The Court of Appeals Erred in Stating That *Wolff* v. *McDonnell* Does Not Apply to the Prisoner Before a Disciplinary Board Who Has Committed an Infraction Which May Also Be Punishable as a Crime.

Nothing in this Court's opinion in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), indicates that its teaching is limited to prison disciplinary hearings for simple infractions not also punishable as crimes. Every aspect of *Wolff* indicates that *all* types of disciplinary hearings were before the court.

To begin, the facts of *Wolff* v. *McDonnell*, as set forth in the District Court's opinion, 342 F. Supp. 616, 626-27 (D. Neb. 1972), comprise both simple infractions of prison rules and more serious behavior which might also be the subject of further criminal prosecution. *Wolff* was a class action and included among its plaintiffs inmates disciplined for "insurrection" (Plaintiff Botts), threatening to kill an officer (Plaintiff Jackson), assault (Plaintiff Montgomery), and drunkenness (Plaintiff Flynn). Such misconduct may also have been punishable as a crime.[5]

[5] See, Neb. Rev. Stat. §§28-411, 28-413, 28-441, 28-445, 28-735, 28-743 (1971).

In this Court's opinion in *Wolff*, there is extensive language to indicate that the whole range of prisoners' infractions was before the Court. Footnote 5, 318 U.S. at 545, reads in part as follows:

> At the time this litigation was commenced, the statute gave examples of "flagrant or serious misconduct" — "assault, escape, attempt to escape." Neb. Rev. Stat. § 83-185 (1971). This was the definition employed by the District Court in deciding that certain offenses were not serious within the meaning of the Act. See n. 2, *supra*. The statutory change does not affect the issues in this litigation.

The fact that the District Court in *Wolff* decided that an infraction was not "flagrant or serious misconduct" in no way foreclosed the State of Nebraska from criminal prosecution of those inmates who had engaged in criminal conduct. In addition, this Court in *Wolff* indicated that the entire range of disciplinary action was before it when it stated as follows:

> The statute provides for a range of possible disciplinary action. "Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term . . . be forfeited or withheld and also that the person be confined in a disciplinary cell." [418 U.S. at 546-47.]
>
> As the statute makes clear, there are basically two kinds of punishment for flagrant or serious misconduct. The first is the forfeiture or withholding of good-time credits, which affects the term of confinement, while the second, confinement in a disciplinary

cell, involves alteration of the conditions of confinement .If the misconduct is less than flagrant or serious, only deprivation of privilege results. [418 U.S. at 547.]

Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. [418 U.S. at 554-55.]

These quotations as well as frequent references to "good-time credits" throughout the opinion indicate that the more serious criminal conduct as well as lesser infractions were considered by this Court in *Wolff, supra.*

More importantly, specific language in this Court's opinion in *Wolff* on the counsel question actually refers to *Baxter I* and indicates that this Court's decision was intended to resolve the presence of counsel question in a different manner than had been done in *Baxter I* and in *Clutchette* v. *Procunier,* 497 F.2d 809 (9th Cir. 1974), *modified and aff'd on rehearing,* 510 F.2d 613 (1975), *cert. granted sub nom. Enomoto* v. *Clutchette,* 33 U.S.L.W. 3641 (June 9, 1975):

The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. *There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held.* At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings [418 U.S. at 570. (emphasis added).]

It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmates and the needs of the institution.[20] [418 U.S. at 572.]

Footnote 20, significantly, states as follows:

[20] The Courts of Appeals, which have ruled on procedures required in prison disciplinary proceedings, have been split . . . As to counsel, two Circuits have held that there is no right, even to lay substitutes, *Braxton* v. *Carlson, supra; Sostre* v. *McGinnis, supra,* while the Third Circuit, *Meyers* v. *Alldredge, supra,* has held that there is no right to counsel where counsel-substitute is provided. The First Circuit, *Baxter* v. *Palmigiano, supra,* holds there is a right to retained counsel, even where a staff-assistant is available, while the Ninth Circuit, *Clutchette* v. *Procunier, supra,* envisions some sanctions ot disciplinary proceedings calling for provision of counsel, and *has determined that counsel must be provided where a prison rule violation may be punishable by state law* . . . . [418 U.S. at 572-73. (emphasis added).]

Despite the clarity of this holding, and even the citation of *Baxter II* and *Clutchette* v. *Procunier, supra,* the First Circuit stated on the right to counsel issue that "the *Wolff* ruling does not directly apply"! *Baxter I,* 510 F.2d at 537, Appendix "A" at 13. There is nothing, however, in this Court's language to indicate that the above quoted language is intended to apply only to disciplinary hearings for infractions not also punishable as crimes. On the contrary, the citation of *Procunier* clearly indicates that the *Miranda* based solution of the Ninth Circuit was specifically

rejected as inappropriate to the disciplinary setting. Neither *Baxter* nor *Procunier* were considered by this Court to be "a reasonable accommodation between the interests of the inmates and the needs of the institution." 418 U.S. at 572.

II. Neither the Sixth Nor the Fourteenth Amendments of the Constitution Require the Presence of Counsel at Prison Disciplinary Hearings Where the Infraction May Also Be Punishable as a Crime.

If it is assumed, *arguendo*, that the teaching of *Wolff* is limited to disciplinary hearings on minor infractions, a brief constitutional analysis will show that there is also no requirement for counsel at disciplinary hearings for more serious infractions in either the Sixth or the Fourteenth Amendments.

The right to counsel is embodied in the Sixth Amendment. The exact language provides as follows:

> In all *criminal prosecutions*, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense. [emphasis added.]

From the language of the provision, it can be seen that "the Sixth Amendment by its terms governs only 'criminal prosecutions'." *Hyser* v. *Reed*, 318 F.2d 225, 237 (D.C. Cir.) *cert. denied sub nom. Jamison* v. *Chappell*, 375 U.S. 957 (1963). The Supreme Court has consistently held that the Sixth Amendment applies only to "critical stages" of a *criminal prosecution*. *United States* v. *Ash*, 413 U.S. 300 (1973); *Argensinger* v. *Hamlin*, 407 U.S. 25 (1972); *Coleman* v. *Alabama*, 399 U.S. 1 (1970); *Massiah* v. *United States*, 377 U.S. 201 (1964); *White* v. *Maryland*, 373 U.S. 59 (1963); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963);

Hamilton v. *Alabama*, 368 U.S. 52 (1961); *Powell* v. *Alabama*, 287 U.S. 45 (1932). The clause was specifically made applicable to the states by *Gideon* v. *Wainwright*, *supra*. Other parts of the Sixth Amendment have also been made applicable to the states through the due process clause of the Fourteenth Amendment, but only in the context of a criminal prosecution. *Duncan* v *Louisiana*, 391 U.S. 145 (1968) (right to trial by jury); *Washington* v. *Texas*, 388 U.S. 14 (1967) (right to compulsory process); *In re Gault*, 387 U.S. 1 (1967) (juvenile criminal proceeding); *Pointer* v. *Texas*, 380 U.S. 400 (1965) (right to be confronted by witnesses); *Klopfer* v. *No. Carolina*, 386 U.S. 213 (1967) (speedy trial); *In re Oliver*, 333 U.S. 257 (1948) (public trial). The Sixth Amendment, therefore, does not require the presence of counsel at prison disciplinary hearings, because "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. Cf *Morrissey* v. *Brewer*, 408 U.S. at 488." *Wolff*, 418 U.S. at 556.

While the Sixth Amendment has no application, the Fifth Amendment privilege against self-incrimination certainly applies. "[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. . . ." *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966). Since the Fifth Amendment, made applicable to the states in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), itself contains no right to counsel, any right to counsel at prison disciplinary hearings for criminal infractions must be found in the more vague right of due process of the Fourteenth Amendment. The question therefore becomes whether the due process requirement of the Fourteenth Amendment, by its

terms applicable to the states, requires the presence of counsel by itself or in aid of the Fifth Amendment right against self-incrimination. Cf. *Miranda, supra,* at 444.

In deciding whether the Fourteenth Amendment by itself [6] requires the presence of counsel at disciplinary proceedings for criminal infractions, one must make the step-by-step weighing analysis utilized in such cases as *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 (1961); *Hannah* v. *Larche,* 363 U.S. 420 (1960); and *Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123 (1951). The State here argues that this type of analysis was made in a careful and extensive manner in *Wolff* and does not need extensive repetition. The Court carefully made a "determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria Workers* v. *McElroy, supra,* at 895. All of the factors considered in *Wolff* continue to be relevant and *equally compelling* whether a disciplinary board considers a simple infraction of prison rules or more serious misconduct also punishable as a crime. While the prisoner has a valid interest in preserving his limited liberty, for the State it continues to be "essential that discipline be swift and sure." *Wolff,* 418 U.S. at 563. *In the case of an infraction which is also a crime, surely the State's interest in swift discipline is even greater than in the case of a minor infraction.* It would be totally illogical were minor offenders subject to immediate and swift discipline while inmates caught with weapons, involved in assaults, etc. were able to make use of the inevitable delays which accompany the presence of lawyers.

"Lawyers [are] masters of the art of frustration, sworn

[6] The Fourteenth Amendment in aid of the Fifth will be considered in the discussion of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), under Argument III, at Brief p. 21, *infra.*

to advance the cause of their client rather than the truth and hence prime instigators of delay and diversion." Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process,* 45 Minn. L. Rev. 803, 838 (1961). Even Justice Marshall in his dissent in *Wolff* agreed somewhat with this observation when he said:

> In view of these considerations, I think it is clear that at least in *those serious disciplinary* cases meeting the *Scarpelli* requirements, see 411 U.S., at 790, any inmate who seeks assistance in the preparation of his defense must be constitutionally entitled to have it. But, although for me the question is fraught with great difficulty, I agree with the Court that it would be inappropriate at this time to hold that this assistance must be provided by an appointed member of the bar. There is considerable force to the argument that counsel on either side would be out of place in these disciplinary proceedings, and the practical problems of providing appointed counsel in these proceedings *may well be insurmountable.* But the controlling consideration for me is my belief that, in light of the types of questions likely to arise in prison discipline cases, counsel-substitutes should be able to provide sufficiently effective assistance to satisfy due process. [418 U.S. at 591-92 (footnote omitted) (emphasis added) [7]]

The State has included in the Appendix (A. 239) a memorandum from a Rhode Island hearing officer pointing out the "delay and very practical problems in providing

[7] A counsel-substitute was provided for Palmigiano, the inmate in this case, as well as the opportunity to consult with his own retained counsel prior to the disciplinary hearing.

It seems unlikely that Justice Marshall in discussing "serious disciplinary cases" would have ignored the requirements of *Miranda* had he thought they had any application. See Argument III, *infra.*

counsel in sufficient numbers at the time and place where hearings are to be held." *Wolff*, 418 U.S. at 570. Following the dictates of *Baxter II*, the State has sought to supply attorneys at all disciplinary hearings involving infractions also punishable as crimes. On March 14, 1975, this involved 27.7% of all pending disciplinary charges.[8] Many inmates refuse appointed counsel, preferring their own. Mr. Donnelly reported as follows:

> [I]t seems that their own attorneys are hard to reach, too busy, etc. and without being able to give notice for forthcoming hearings to these attorneys, I find it impossible to schedule. Once word gets out to the inmates that by requesting their own attorneys to be present, this will become very fashionable to do with inmates wishing to prolong the hearing dates, thus giving the board yet another obstacle. [sic] [A. 239-40.]

It should be noted that this report was prepared on March 14, 1975, long before the granting of certiorari in this case and was thus obviously not prepared specifically for this case.

Further argument against the requirement of counsel is the fact that they are required but not permitted to take an active part in the hearing. *Baxter II* was recently interpreted by the United States District Court for the District of Rhode Island in the case of *Roberts* v. *Taylor*, 390

[8] *Baxter II* requires counsel only where criminal "prosecution is contemplated." Since the grand jury and the attorney general decide whether to indict, application of this *vague* standard requires an attorney whenever an infraction might also be a crime in the judgment of prison authorities, none of whom are attorneys. Prior consultation with the Attorney General in each case to determine whether prosecution is contemplated would cause so much delay that counsel are now supplied in every case where prosecution *might* be contemplated in order not to foreclose a later decision to prosecute.

F. Supp. 705 (D.R.I. 1975). The District Court specifically stated that while *Baxter II* required that the already indicted prisoners have advice of counsel at the disciplinary hearing, counsel would not be permitted to argue for the inmate. 390 F. Supp. at 709. Surely this function could be just as well served by a counsel substitute given the informal nature of these hearings.

Because an infraction involves a crime does not mean that a lawyer is any more necessary to the inmate in defending himself before the disciplinary board. Certainly numerous retained lawyers cannot be permitted to rove through prisons marshalling facts to mount a defense. This can be done without serious institutional problems, however, by an authorized inmate or classification officer acting as counsel substitute. In *Wolff*, this Court required notice to "enable *him* [i.e. the inmate] to marshall the facts and prepare a defense." 418 U.S. at 564 (emphasis added). The Court required no less than 24 hours notice, implying a quick and prompt hearing. Should the hearing be less quick and prompt because a crime is involved? One could go on for many pages weighing the disadvantages of a counsel requirement at disciplinary hearings, but it is apparent that *every reason discussed by the Court in Wolff applies with equal or greater force to the situation where an infraction is also a crime.* Swift and sure discipline, as distinguished from adjudication of criminal guilt, is required. Many if not most of the serious infractions in prison are committed by one prisoner against another, and therefore the weighing of the scale in the interests of discipline is as much for the safety of the inmates as for the benefit of the prison authorities.

When considering the question of right to counsel, it is inappropriate to extend the right granted to persons outside prison to those lawfully incarcerated within the

prison walls. Cf. *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). There is an important and crucial difference between one within and without the prison walls.

> A prisoner is one whose freedom has been intentionally restricted in the interests of the safety of society, his own reform, and a deterrence of misconduct by him or others. While he is not sent to prison for punishment, he has been sent there as punishment. It is not appropriate that he have all the liberties of a free man. [*Nolan* v. *Scafati*, 306 F. Supp. 1 (D. Mass. 1969 (Wyzanski), vacated and remanded, 430 F.2d 548 (1st Cir. 1970).]

While one is entitled as an innocent man to the full panoply of due process rights before being incarcerated, once duly convicted and in prison, one is on notice that further infractions, minor or serious, will be dealt with swiftly and fairly but without the great and history-laden ceremony accompanying one's initial adjudication as a criminal. If those infractions are also crimes, certainly a full trial must follow before an inmate's record is further tarnished by conviction for that crime; but that is apart and separate from the offense of breaking the rules of the institution to which he was constitutionally sent as punishment. We must remember that "we deal here, not with the right of an accord to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee [or as here, an inmate] only because he has been convicted of a crime." *Gagnon* v. *Scarpelli*, 411 U.S. 778, 789 (1973).

III. The Facts and Policy of *Miranda* v. *Arizona* Have No Application to a Prison Disciplinary Hearing Under the *Morris Rules*.

In *Baxter II*, the Court of Appeals stated that the disciplinary hearing for an infraction where future prosecution is contemplated is not covered by *Wolff* but "is more akin to that presented in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), . . ." *Baxter II*, 510 F.2d at 537; Appendix "A" at 13. An analysis of the facts and policy behind *Miranda* show that it has no application to a disciplinary hearing for a criminal infraction under the *Morris Rules*.

All of the cases considered in *Miranda, supra*, contained certain key common features which were summarized by this Court as follows:

> The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney *in a room in which he was cut off from the outside world.* In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—*incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.* [384 U.S. at 445. (emphasis added)]

The key factor here is the *incommunicado interrogation* in a room "cut off from the outside world."

How different is the atmosphere in the disciplinary hearing room at issue here. The *Morris Rules* require (a) oral and written notice in advance, and thus questioning which occurs at the hearing is no surprise to the inmate; (b) timely notice of the right to remain silent;[9] (c) appearance at the disciplinary hearing with the right to assistance of an authorized counsel-substitute, and thus the inmate is never incommunicado;[10] (d) an impartial tribunal, none of whose members reported upon, witnessed, or investigated the alleged infraction, and thus the factor of the "eager beaver" detective seeking another "crime solved" on his record is totally absent;[11] (e) the right to call witnesses and to cross-examine them, further dispelling any atmosphere of "incommunicado interrogation"; (f) the right to tape record the entire proceeding,[12] further guaranteeing the inmate that any strong-arm tactics would be readily available for proof in a subsequent judicial proceeding; and (g) a decision "based upon substantial

[9] At the time of the investigation by the superior officer, the inmate is advised that "although statements he makes in his defense at a disciplinary hearing are probably not admissible for affirmative use by the prosecution at a trial, he may wish to consult an attorney to determine what action to take." *Morris Rules, Disciplinary Procedures*, II(I). A. 206. In addition, at the beginning of the hearing Palmigiano and each inmate is advised that he has a right to remain silent but that his silence will be held against him. A. 207.

[10] In addition to the warnings given in footnote 9, *supra*, presumably the classification officer or authorized inmate assigned as counsel-substitute will advise the inmate of his right to remain silent. Palmigiano and any other inmate charged has an opportunity to consult with his own retained counsel prior to any hearing.

[11] See Chart, A. 241, showing numerous dismissals and not guilty findings at disciplinary hearings.

[12] A tape recording of the entire disciplinary hearing is part of the record in this case, thus giving the Court a unique opportunity to "be present" at the hearing and to observe the total lack of an atmosphere of "incommunicado interrogation." Tape recordings are now made of all hearings by the Board itself rather than by the inmates on their own or borrowed tape recorders.

evidence," which requires independent evidence if an inmate exercises his right to remain silent.[13]

This Court has recently said that "the *Miranda* decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theory that custodial *interrogation* is inherently coercive." *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972) (emphasis in original). The type of questioning which goes on in the orderly atmosphere of a prison disciplinary hearing under the *Morris Rule* is not the type of questioning which the Court sought to proscribe in *Miranda*. Rather, there, the Court was concerned with the possibility of "police interrogation [whose effect] was to put the defendant in such an emotional state as to impair his capacity for rational judgment." *Miranda*, 384 U.S. at 465. With advance notice and the assistance of an authorized counsel substitute, there is little possibility that the defendant will lose his capacity for rational judgment. He need simply confer with his counsellor as to whether a course of action is wise.

The requirement of counsel set down in *Miranda* was found "necessary to make the process of police interrogation conform to the dictates of the privilege" "unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, . . ." 384 U.S. at 466, 479. This Court expressly stated that the Congress and the States might devise "potential alternatives for protecting the privilege . . . ." *Id.* at 467. *Miranda* was not intended to apply to *every* situation where an accused is questioned:

[13] While an inference of guilt is made from an inmate's silence, it alone would not be substantial evidence. See discussion in Argument IV, *infra*.

> Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and assuring a continuous opportunity to exercise it, the following safeguards must be observed. [The four *Miranda* warnings follow]. [*Id.* at 467.]

The *Morris Rules* are just such a creative search for a way to provide for efficient prison administration [as distinct from criminal law enforcement] while protecting the privilege against self-incrimination. A set, orderly procedure is set down. Each inmate upon arrival at the ACI is given a copy of the *Morris Rules*. He knows what will happen if he is "booked" with a disciplinary charge, and especially that he is entitled to the assistance of an authorized counsel-substitute in his defense before the disciplinary board. The *Morris Ruls*, we submit, provide for an effective method of apprising the inmate of his privileges and assure a continuous opportunity for its exercise without the necessity of the presence of counsel at the disciplinary hearing. These hearings are not "kangaroo courts," as can be seen from the chart in the Appendix at page 241. Many cases are dismissed for lack of evidence, and the inmate is found not guilty in a substantial portion of the cases. Furthermore, nothing prevents an inmate from consulting with his attorney prior to the hearing by phone or by person should his attorney visit the ACI. In short, the policies which *Miranda* sought to effectuate are

not abandoned by the absence of counsel but guaranteed by a procedure which is "at least as effective" as that devised by the Court in *Miranda*. Furthermore, other policies not considered in *Miranda*, such as efficient prison administration, are simultaneously furthered. Despite the superficial resemblance to a criminal proceeding, we are here concerned with a disciplinary hearing and not with a step in a criminal prosecution. In summary, the setting for the exercise of the Fifth Amendment right against self-incrimination is completely different here, and the procedures for protection of the privilege are adequate.

In applying *Miranda* to the facts of this case, the Court of Appeals in *Baxter II* relied heavily upon *Mathis* v. *United States*, 391 U.S. 1 (1968) which "applied *Miranda's* reasoning to those already in prison." 510 F.2d at 537; Appendix "A" at 14. This statement is only superficially correct and does not provide a basis for the application of *Miranda* to a prison disciplinary hearing as distinct from an in-prison criminal interrogation. The facts of *Mathis* have little resemblance to those here, other than a common prison setting. First of all, *Mathis* repeated the setting of *incommunicado questioning* which *Miranda* sought to infuse with Constitutional guarantees.[14] From the Court's opinion, nothing indicates that the inmate had any assistance whatsoever during his "interview" with the tax agent. Furthermore, the inmate was never advised of his right to remain silent. Most importantly, the agent admitted "his investigation . . would end up in a criminal investigation." 391 U.S. at 4. The application of *Miranda* was deemed necessary in order to effectuate the protection of the Fifth Amendment privilege in the factual situation presented in *Mathis*; this does not mean that *Miranda*

[14] This same incommunicado setting within the defendant's own home provided the main basis for the Court's decision in *Orozco* v. *Texas*, 394 U.S. 324 (1969).

must be applied to the totally different situation of a disciplinary hearing simply because it takes place within the prison walls. The prison setting of the disciplinary hearing is the only common factor between *Mathis* and the case now before the Court. The rationale of *Mathis* was "to give meaningful protection to Fifth Amendment rights." 391 U.S. at 4. Those same rights are adequately protected by the *Morris Rules*.

Although the Court of Appeals mentioned *Miranda* v. *Arizona* in *Baxter I*, 487 F.2d at 1289, A 226, it did so only in the context of the exclusionary rule's suppression of incriminating statements at a subsequently criminal trial. Nowhere in *Baxter I* is there any mention that *Miranda* requires the presence of counsel at all disciplinary hearings where future prosecution is a realistic possibility. In fact the required presence of counsel was specifically rejected in the following passage:

> While we are well aware that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel", *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932), we do not feel that prison disciplinary hearings necessarily require professionally trained counsel. The requirement of professionally trained counsel in all cases could amount to a significant expense for the government, both in supplying counsel for the accused and, because the hearing is likely to become more adversarial as a result, in prolonging the proceeding and making it necessary for the state to be represented by its own attorney. The state is not now represented by a prosecutor within the hearings, nor are formal rules of evidence in force to the extent that a defendant's procedural rights may be lost if not timely raised. Nor is there a jury for whom a defendant's presentation must be made understandable. See *Gagnon* v. *Scarpelli, supra*, 411 U.S. at 789. Moreover, the evidence as to whether the inmate has violated a prison regulation is likely to be simpler, more precise and more readily at hand than in most criminal trials, *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971). While the requirement of legal counsel might be more compelling where the accused, faced with a possible criminal prosecution in the future, had to walk a tightrope between defending himself now and incriminating himself later on, the provision of use immunity eliminates this potentially complicated endeavor. We have no reason to believe that counsel-substitute, of the sort provided for in the *Morris* rules, will not normally provide adequate assistance to an accused inmate within the disciplinary hearing. [*Baxter I*, 487 F.2d at 1291.]

When use immunity was eliminated in *Baxter II*, the Court then characterized the "tightrope" which flows from remaining silent as one of those adverse consequences which is not unconstitutional. Cf. *Flint* v. *Mullen*, 499 F.2d 100 (1st Cir. 1974).

Also relevant to the *Miranda* v. *Arizona* question is the Court's decision in *Gagnon* v. *Scarpelli*, 411 U.S. 773 (1973), heavily relied upon prior to *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), as authority for requiring counsel at disciplinary hearings. *Wolff*, of course, found the observations on the requirements of counsel in *Scarpelli, supra*, as inappropriate to the prison disciplinary setting. It is interesting to note that while the plaintiff in *Scarpelli* had his parole revoked for being involved in and arrested for a burglary, this Court nowhere held that *Miranda* v. *Arizona* thereby required the presence of counsel at his parole revocation proceeding. In fact, the Court observed that it would be

neither "possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements." 411 U.S. at 790. Certainly on the basis of the fact situation presented in *Scarpelli*, this Court would have mentioned that *Miranda* required the presence of an attorney if the possibility of future prosecution were the crucial fact. If *Miranda* has no application to a parole revocation hearing where the parolee faced future prosecution, the reasons are even less compelling for its application to "the very different situation presented by a disciplinary proceeding in a state prison." *Wolff*, 418 U.S. at 560.

IV. A Disciplinary Board May Properly Draw an Inference of Guilt From a Prisoner's Silence at a Disciplinary Hearing, and if Such an Inference Is Made, Need Not Grant Use Immunity For Any Statements the Prisoner May Make.

1. *Silence as Inference of Guilt.*

Before Palmigiano's disciplinary hearing, he was specifically advised by Deputy Warden Remillard that while he had a right to remain silent, his silence would be considered a factor against him. (A. 43) Is this an impermissible burden on the exercise of Palmigiano's Fifth Amendment right to remain silent? *Baxter II* forbids it.[15]

This Court's decision in *Griffin* v. *California*, 380 U.S. 609 (1965), made clear that the Fifth Amendment in its direct application to the Federal government, and in its

[15] *Baxter II*, 510 F.2d at 536, Appendix "A" at 13.

bearing on the states by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by a court that such silence is evidence of guilt. *Id.* at 615. This is black letter law. Nevertheless, whether a jury can yet go on to consider silence as evidence of guilt has not yet been decided. In footnote 6 in *Griffin, supra*, at 615, the Court stated:

> We reserve decision on whether an accused can require, as in *Bruno* v. *United States*, 308 U.S. 287, that the jury be instructed that his silence must be disregarded.

A reading of *Bruno, supra*, shows that its holding rested on a federal statute and not on constitutional grounds. Petitioners have been unable to find any cases which extend this federal requirement to state trials or proceedings. See, *United States* v. *English*, 409 F.2d 200 (3d Cir. 1969). Even the doctrine of *Bruno* is not of constitutional dimension, but rests on 18 U.S.C. §3481.

While there is language in *Malloy* v. *Hogan*, 378 U.S. 1 (1966), forbidding any penalty for exercise of the right to silence, it must be remembered that that opinion was rendered in the context of a criminal prosecution. Here we consider a prison disciplinary hearing. *Baxter II* boldly states that an inmate's silence "may not be used against him at that time [i.e., at the disciplinary hearing] or in future proceedings. *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973); see *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Spevack* v. *Klein*, 385 U.S. 511 (1967)." 510 F.2d at 536-37; Appendix "A" at 13. The cited authorities are, however, clearly distinguishable from the prison disciplinary context and do not stand for the proposition cited. The penalty in *Lefkowitz, supra*, consisted of an obligatory forfeiture of state contracts for five years. In other words, the penalty

was automatic upon exercise of the privilege. Here, the inmate's silence does not necessarily mean being found guilty of the infraction. The chart (A. 241) shows that inmates are often found either not guilty or the charges are dismissed despite the fact that their silence may be used against them. *Spevack* and *Garrity, supra,* present similar situations where the imposition of the penalty is *automatic* upon exercise of the privilege of silence. In addition, in each of these cases, the hearings were held with the express purpose of gathering evidence for a criminal trial. Such is not the case here. None of these authorities stand directly for the proposition that a disciplinary board may not consider silence of an inmate as a factor against him.

While no person should be required to be a witness against himself, common sense tells any person that silence often means inference of guilt. Silence in the face of an accusatory statement, where the accused has understood the statement and where an opportunity to deny exists, is admissible as an admission of guilt. See *Osborne* v. *United States,* 371 F.2d 913 (9th Cir.), *cert. denied,* 387 U.S. 946, *rehearing denied,* 389 U.S. 891 (1967); *United States* v. *Adams,* 470 F.2d 249 (10th Cir. 1972). Cf. *Fowle* v. *United States,* 410 F.2d 48 (9th Cir. 1969). In the informal setting of the prison disciplinary hearing, the board ought to be permitted to make the logical inference that silence is some evidence of guilt.

Certainly, the ACI disciplinary board should not find an inmate guilty of an infraction solely on the grounds that he failed to deny an accusation, and the *Morris Rules* are clear in requiring that the "board decision must be based upon substantial evidence." (A. 208). In this particular case, the direct eye-witness observations of the reporting officer provided uncontradicted extrinsic evidence. Nevertheless, the failure of Palmigiano to testify reinforced

that evidence, and the State maintains that this inference was both reasonable and constitutionally permissible. The disciplinary board based its finding upon extrinsic evidence and upon the failure of Palmigiano to counteract that evidence either by his own testimony or by calling any witnesses, including the single adverse witness.

The policy reasons for permitting a disciplinary board to consider silence as some evidence of guilt were aptly stated by the Court of Appeals in *Baxter I* as follows:

> The right to remain silent in the disciplinary hearing without his silence being used against the inmate would, however, impose a significant burden upon the processes of fact finding within the disciplinary hearing. The hearings are designed to enable inmates to challenge and dispute allegations about their behavior, and to explain "their side of the story".[22] The practical effect of a right to remain silent would be to eliminate such an opportunity, and force the inmate and the disciplinary board to rely exclusively upon the statements of witnesses. Not only would such reliance be time consuming, but it might also prompt inmates "to pit their own resources against correctional staff in ways that challenge institutional solidarity and encourage confrontations in other areas".[23] Moreover, an exercise of the right to remain silent does not impose a significant burden upon the defendant in a normal criminal trial, because of such procedural safeguards as a strong presumption of innocence, a high burden of proof which the prosecution must overcome, and the full right to call witnesses and cross-examine adverse witnesses. Such safeguards, however, do not exist within the prison disciplinary hearing; if they did, the administrative burdens thereby entailed would be significant. Thus, an

inmate's silence is likely to work against him in the disciplinary hearing, because in maintaining his silence he sacrifices his most important defense.

---

[22] *See* Lovall and Nelson, *Correctional Management and the Changing Goals of Correction*, in Problems in Criminal Justice Administration 82 (M. Cohn, ed., 1969).

[23] Note, *Bargaining in Correctional Institutions*, *supra*, at 733. [*Baxter I*, 487 F.2d at 1289 (1973).]

These reasons are valid whether the infraction is minor or one also punishable as a crime.

2. *Use Immunity.*

In *Baxter I*, the Court of Appeals permitted silence as evidence of guilt but required use immunity; in *Baxter II*, the Court found both procedures constitutionally defective. The State argues that not only should a prisoner's silence be permitted to be evidence of his guilt of an infraction because of the unique prison setting, but he should not be entitled to receive "use immunity" for any statements he may make. *McGautha* v. *California*, 402 U.S. 183 (1971); *Flint* v. *Mullen*, 499 F.2d 100 (1974).

There may be some question as to whether the State is here permitted to argue against use immunity, in that *Baxter II* in effect does not require it. On the other hand, the teaching of *Baxter I* and *II* together is that use of silence as evidence of guilt requires the granting of use immunity. Thus, assuming that this Court accepts the State's argument that silence may be used as evidence of guilt, it is necessary to show why use immunity should not be granted as a result in the manner of *Simmons* v. *United States*, 390 U.S. 377 (1968). As a practical matter, there are even reasons for the State to argue for the granting of use immunity. A small percentage of prison criminal infractions are actually prosecuted. Use immunity

is considered by some prison officials as a useful tool in forcing the inmate to "fess up" immediately. Nevertheless, as a legal proposition, the State here argues that there is no constitutional requirement that use immunity be granted.

The granting of use immunity in the Palmigiano situation is an impermissible extension of the teaching of *Simmons, supra.* In *Simmons*, this Court held that a rule which required a defendant to testify at a pretrial suppression hearing, in order to assert his Fourth Amendment claims, created an unconstitutional tension with his Fifth Amendment privilege against self-incrimination. As a result, use immunity was granted against use of the testimony given at the suppression hearing at the trial in chief. *Simmons* considered the question of an accused faced with the choice between raising one constitutional right and foregoing another. Here, Palmigiano faced no tension between Constitutional rights. His choice was whether or not to exercise his Fifth Amendment right to remain silent. Palmigiano's decision was little different from that made by any other defendant in any criminal trial.

McGautha v. *California*, 402 U.S. 183 (1971) presents a situation much more akin to that faced by Palmigiano. There the defendant faced the difficult choice of testifying in order to obtain a more lenient sentence and risking self-incrimination or remaining silent and risking a harsh sentence. This Court held that the choice did not unconstitutionally burden the defendant's Fifth Amendment right. Palmigiano faced a similar choice, *viz.*, testify to avoid discipline and obtain a more lenient penalty while risking self-incrimination or remain silent and risk harsher discipline but avoid self-incrimination. Cf. *Brady* v. *United States*, 397 U.S. 742 (1970). The fact that his silence might be used against him is not determinative. In

McGautha, supra, the defendant made his choice in the context of a full criminal trial; Palmigiano's choice was required in a prison disciplinary proceeding where such a procedure is appropriate.

Nothing in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), requires the granting of use immunity in this situation. The Court imposed the exclusionary rule to guarantee certain police behavior to protect the Fifth Amendment right against self-incrimination. Here, as the State has argued above, the *Morris Rules* provide that same protection. Were a disciplinary hearing to be held without the procedural protections required by the *Morris Rules,* with an appropriate warning to the inmate of his right to remain silent, then it would be appropriate for a court of law to apply the exclusionary rule against further use of any testimony given at such a defective disciplinary hearing. Where the *Morris Rules* are scrupulously followed, however, the imposition of use immunity is an *unjustified further penalty upon the State* (and perhaps the federal government) despite its earlier provision of sufficient protections of the Fifth Amendment privilege.

Finally, the granting of use immunity pursuant to *Baxter II* requires that the immunity be announced by prison officials at the disciplinary hearing. These officials themselves lack the authority to grant immunity. The protections is not effectuated, therefore, at trial as in *Miranda,* but by non-attorney correctional officials. The Attorney General of Rhode Island is alone permitted to grant such immunity. Thus the disciplinary hearing will be transformed from a swift, flexible procedure into a formal, quasi-judicial proceeding with full stenographic transcript, attendance of the Attorney General or an Assistant Attorney General, with the delay and expense which inevitably accompany such proceedings.

Conclusion

For the reasons stated, the State of Rhode Island and Providence Plantations respectfully submit that the portions of the judgment below requiring the presence of counsel, forbidding the use of silence as evidence of guilt, and the granting of use immunity be reversed.

Respectfully submitted,

JULIUS C. MICHAELSON
Attorney General
RONALD A. DWIGHT
Special Assistant
Attorney General
250 Benefit Street
Providence, Rhode Island 02903
Counsel for Petitioners

July 24, 1975